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Supreme Court, U.S.
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No. 01-26

IN THE

Supreme Court of the United States

DAVID SMITH,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of effective assistance of counsel, in violation of the Sixth Amendment, based upon counsel's failure to pursue a challenge to the Illinois Death Penalty Statute—which grants Illinois prosecutors virtually unfettered discretion in seeking a death sentence once basic criteria are met and thereby authorizes arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

2. Whether the Illinois Post Conviction Statute and its application to petitioner by the Supreme Court of Illinois violates the Eighth and Fourteenth Amendments in failing to allow meaningful review of constitutional claims.

3. Whether petitioner was deprived of effective assistance of counsel at trial, resentencing and on appeal, in violation of the Sixth Amendment, based upon counsel's failure to introduce certain exculpatory and mitigating evidence.

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OPINIONS BELOW

The opinion and order of the Supreme Court of Illinois affirming petitioner's conviction and vacating his sentence is reported at 152 Ill. 2d 229, 604 N.E.2d 858 (1992) and set forth in the Appendix hereto at A. The opinion of the Supreme Court of Illinois affirming petitioner's re-sentencing is reported at 176 Ill. 2d 217, 680 N.E.2d 291 (1997) and set forth in the Appendix hereto at B. The opinion of the Supreme Court of Illinois affirming the dismissal of petitioner's petition for post-conviction relief is reported at 195 Ill. 2d 179, 745 N.E.2d 1194 (2000) and set forth in the Appendix hereto at D. The order of the Supreme Court of Illinois denying petitioner's timely petition for rehearing is unreported and set forth in the Appendix at E.

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Illinois entered its judgment on December 1, 2000. The Supreme Court of Illinois denied petitioner's timely petition for rehearing on April 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All relevant constitutional and statutory provisions are reproduced in the Appendix at G.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

A man stands condemned to die. Petitioner, David Smith, was charged with murder and other offenses in connection with the March 17, 1987 death of Lisa Ferguson. Pursuant to 720 Ill. Comp. Stat. Ann. 5/9-1(d) (West 1993 & Supp. 1998) (Appendix at G), a county prosecutor independently sought and obtained the death penalty.

A prosecutor may request a sentencing hearing for the purpose of imposing the death penalty only for defendants over the age of eighteen who are accused of first-degree murder. *Id.* § 9-1(b)-(d). In each of the 102 counties in Illinois, the county prosecutor is given total discretion to decide for which death eligible defendants he will request a capital sentencing hearing. *Id.* Where such a hearing is requested, and after a finding of guilt and consideration of statutory aggravating and mitigating factors, a jury or judge may sentence a defendant to death. *Id.* Where a prosecutor does not request such a hearing in a death eligible case, the presiding judge or jury has no authority to impose the penalty of death on a defendant. *Id.* § 9-1(d).

On January 11, 1989, petitioner was found guilty of murder, home invasion, and aggravated criminal sexual assault. Two days later, petitioner was sentenced to death.

On October 15, 1992, the Illinois Supreme Court issued its opinion in the direct appeal, affirming petitioner's conviction. *Illinois v. Smith*, 152 Ill. 2d 229, 274, 604 N.E.2d 858, 877 (1992) (Appendix at A). However, it vacated the death sentence and remanded for a new sentencing hearing for failure to life-qualify the jury. *Id.* On March 21, 1994, petitioner was again sentenced to death. Mr. Smith again appealed.

While awaiting the Illinois Supreme Court's opinion regarding his second sentence of death, in order to preserve his rights under the ever-changing Illinois Post-Conviction Hearing Act, petitioner filed a *pro se* petition for post-conviction relief on December 21, 1995. On January 26, 1996, counsel was appointed to represent petitioner. On February 9, 1996, the State filed a Motion to Dismiss petitioner's *pro se* petition for post-conviction relief. Meanwhile, the Illinois Supreme Court affirmed petitioner's second capital sentence and denied a Petition for Rehearing. *Illinois v. Smith*, 176 Ill. 2d 217, 261, 680 N.E.2d 291, 314

(1997) (Appendix at B). This Court denied Mr. Smith's petition for a writ of *certiorari* on October 14, 1997. *Smith v. Illinois*, 522 U.S. 920 (1997) (Appendix at C).

After filing a *pro se* petition for post-conviction relief, appointed counsel sought an evidentiary hearing on an amended petition, based *inter alia*, on a substantial showing of violations of constitutional rights, including ineffective assistance of counsel at trial, sentencing, and on appeal, and a challenge to the constitutionality of the Illinois Death Penalty Statute under the Eighth and Fourteenth Amendments. The trial court failed to consider the post-conviction claims relating to the guilt-innocence stage of his trial because it found that the claims were either waived or barred. It also concluded that the sentencing claims were barred by the doctrine of *res judicata*. The Illinois Supreme Court found that these claims should have been considered by the trial court. *Illinois v. Smith*, 195 Ill. 2d 179, 207-08, 745 N.E.2d 1194, 1210-11 (2000) (Appendix at D). However, reviewing the trial court's decision *de novo*, the court held that an evidentiary hearing was unnecessary. On April 2, 2001, the Illinois Supreme Court summarily denied petitioner's final plea for rehearing. (Appendix at E.) [1]

II. FACTS PRESENTED TO THE TRIAL COURT

A. The Guilt Phase

Detailed discussions of the facts are found in the previous published opinions in this case at *Illinois v. Smith*, 152 Ill. 2d 229, 604 N.E.2d 858 (1992) (Appendix at A) and *Illinois v. Smith*, 176 Ill. 2d 217, 680 N.E.2d 291 (1997) (Appendix at B). However, certain facts relevant to this proceeding are set forth below.

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[1] On April 17, 2001, the Illinois Supreme Court granted petitioner's motion to stay mandate of execution pending appeal or application for writ of *certiorari*. (Appendix at F.)

Juanita Soto testified that she was the victim Lisa Ferguson's aunt, and was living with her at 3122 S. Union in Chicago. (R. 521) [2] On March 17, 1987, she went to meet her boyfriend at Bucko's Bar where she saw petitioner appear intoxicated. (R. 530-46)

That evening, police responded to a radio call of a fight in progress at 3122 South Union and found the body of a white female and a four-year-old girl in the apartment who told the police that a man named "David", her father's friend, had been in the apartment that evening. The police proceeded to the home of petitioner, David Smith.

Upon arriving, the police heard an argument in the basement apartment between a male and a female, with a male voice saying "I saw someone get killed tonight," followed by the statement, "I did it." (R. 720-722) After the officers knocked on the door of the basement apartment, and the male identified himself as petitioner, they arrested him. (R. 722-723) However, the police report prepared in connection with the arrest fails to include this statement. (R. 740) [3]

At approximately 1:00 a.m. on March 18, 1987, petitioner made an oral statement concerning the Ferguson homicide to a detective. (R. 879) A prosecutor then composed a handwritten statement, which petitioner signed. (R. 891-894)

Rose Palomino testified for the defense that, on the night of March 17, 1987, she and her daughter Josephine, petitioner's girlfriend, went to the police station at 39th Street and California. (R. 935) She heard petitioner "yelling for Josie,

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[2] Citations to the record will be as follows: "R" and "R.S." refer to the common law record of petitioner's trial and resentencing hearing. "C" refers to the common law record of the post-conviction proceedings.

[3] At the time of his arrest, Officer Lukensmeyer found a pair of jeans and thermal underwear in a laundry wash basin in petitioner's apartment. There was human blood on the thermal underwear. No blood was found on the jeans. (R. 742)

calling her name, [and screaming] let me see Josie, let me see Josie." (R. 943) Rose Palomino also heard petitioner say, "Get your fucking hands off me." (R. 944) She further heard him say, "I just want to see Josie, for God sakes, let me see Josie," and testified that Smith was yelling and calling for help. (R. 946-947)

The jury found petitioner guilty of murder, home invasion, and aggravated criminal sexual assault. (R. 1045) The same jury imposed the death penalty. The Illinois Supreme Court affirmed petitioner's conviction, but vacated the death sentence.

B. The Resentencing Hearing

Petitioner waived his right to be re-sentenced by a jury. (R.S. 46-47) At the resentencing hearing, the following key evidence was introduced:

1. *Eligibility Phase*

The court took judicial notice of the fact that petitioner was over the age of 18 at the time of the murder and that the jury convicted petitioner of murder, home invasion and aggravated criminal sexual assault, and on that basis to find him eligible for the death penalty. (R.S. 50-51)

2. *Penalty Phase*

a. Aggravation

During the penalty phase of the resentencing hearing, the State presented many of the same witnesses they had presented at trial. (R.S. 60-100)

Brian Upchurch, an officer with the Illinois Department of Corrections assigned to the Condemned Unit at Pontiac Correctional Center, testified that, on November 11, 1992, petitioner threw hot water on him as he walked past petitioner's cell. (R.S. 131-133) Upchurch did not suffer any permanent disability. (R.S. 144)

Jill Beatty testified she was an Officer with the Illinois Department of Corrections previously assigned to the Condemned Unit at Pontiac. (R.S. 145-146) She testified that on January 2, 1990, she found a television antenna, considered to be a shank, in petitioner's cell during a routine shakedown. (R.S. 146-148)

b. Mitigation

(i) *Stipulated Prior Testimony*

Tim Martin testified that he is employed by the Cook County Sheriff's Office and that he supervises inmates at Cook County jail. (R. 1133-1134). For 18 months, beginning in May of 1987, petitioner was one of his volunteer workers on the wing. (R. 1136-1137) Mr. Martin testified regarding petitioner's good behavior during the 18 months that he was assigned to supervise petitioner's wing. (R. 1137-1139) He testified that petitioner would succeed in an institutionalized setting and that he would not be a danger to other inmates. (R. 1144)

James Smith, petitioner's younger brother, testified regarding their broken family life, petitioner's habitual drug use, and petitioner's criminal activity when they were juveniles. (R. 1180-1212) He stated that while living in Arizona with their father, they would run away and steal things. (R. 1192-1194) James Smith also testified that when living in Arizona, petitioner had started using marijuana and may have tried acid (LSD). (R. 1193, R. 1199) When he saw petitioner again in Chicago, Illinois, in 1980, petitioner's drug use had expanded to acid (LSD), PCP, uppers, downers, and alcohol. (R. 1199-1201)

Josephine Palomino testified that she and petitioner started living together in June of 1986 and that they have a son named David who was born on April 16, 1987. (R. 1223) She testified about her knowledge of petitioner's troubled childhood and past drug use. (R. 1215-1239)

(ii) *New Testimony Presented at the Resentencing Hearing*

Josephine Palomino testified again at the resentencing hearing. (R.S. 249-260) She testified that the relationship that has developed between petitioner and their son is very strong. (R.S. 254) Josephine Palomino testified that petitioner's execution would devastate her son. (R.S. 256)

Dr. Lawrence Heinrich, a licensed clinical psychologist, testified that he was asked to evaluate petitioner to determine whether there was any mental condition that might constitute mitigation. (R.S. 264) He reviewed numerous documents and interviewed petitioner, Josephine Palomino, and Rose Palomino. (R.S. 264) Dr. Heinrich also administered four psychological tests and concluded that petitioner suffers from long-standing emotional and personality deficiencies, the most prominent of which were a borderline personality disorder and schizotypal personality disorder. (R.S. 268) Dr. Heinrich testified that these deficiencies, exacerbated by drug and alcohol abuse, severely impaired petitioner's judgment and ability to control his behavior at the time of the victim's death. (R.S. 273)

Dr. George Savarese, a licensed clinical social worker, testified that he was asked to compile a comprehensive psychosocial developmental history of petitioner. (R.S. 299) He reviewed various records and interviewed petitioner and others. (R.S. 299-301) Savarese, like Heinrich, concluded that petitioner suffers from a borderline personality disorder with schizotypal features. (R.S. 304) He testified these disorders were the result of a dysfunctional developmental history. (R.S. 326) Savarese testified that it was his professional opinion that, as a result of petitioner's personality disorders, in addition to his alcohol and substance abuse, petitioner could have slipped into a transient psychotic state on the night of the offense. (R.S. 330-331) Dr. Savarese testified that at the time of the offense petitioner was

suffering from an extreme mental and emotional disturbance which substantially impaired his ability to conform his behavior to the requirements of the law.

The court found that petitioner was not acting under the influence of an extreme mental or emotional disturbance at the time of the offense involving Lisa Ferguson, and also that there were no mitigating circumstances or factors sufficient to preclude imposition of the death sentence. (R.S. 464)

III. NEW FACTS PRESENTED IN THE AMENDED PETITION FOR POST- CONVICTION RELIEF

Petitioner filed his original petition for post-conviction relief on December 21, 1995, and his amended petition for post-conviction relief on December 5, 1997. In his amended post-conviction petition, petitioner brought nine claims which were supported by affidavits which contained significant *new evidence not produced at the original trial or resentencing.*

A. Evidence Regarding Petitioner's Childhood and Adolescence

1. *Petitioner's Early Childhood*

Petitioner's infancy, childhood, and adolescence were marked by developmental neglect, social and familial turmoil, environmental chaos, along with significant and habitual drug and alcohol dependence. These factors had devastating consequences for petitioner's neurological, social, and emotional development.

Petitioner's father had a severe drinking habit and was often absent. (C. 199, 202) His mother was often suicidal. (C. 200) His parents separated and his mother entrusted petitioner and his five siblings, who were between the ages of 2 and 11 years old, to a 16-year-old babysitter. (C. 199, 207) His mother neglected the children, leaving them to fend for

themselves in a small apartment with no beds or furniture. They did not eat well and were not clean. (C. 207, 212)

2. *Petitioner's Life With His Father and Abusive Stepmother*

Petitioner's father moved the children to Arizona without their mother's knowledge. The children boarded a bus in the middle of the night to go to their father's house, where the children had no clothes or furniture. (C. 203, 212) The household included nine children in the combined family of petitioner's father and stepmother. Life with his father and stepmother included discipline by beatings. (C. 212, 217) All of the children, including the teenagers, were forced to take baths together and were not allowed to speak at dinner. (C. 207) Petitioner and his brother once ran away and lived at the airport for a few days. (C. 213) When petitioner was ten years old, he engaged in a sexual relationship with his eighteen-year-old babysitter. (C. 220)

3. *Petitioner's Delinquency and Adolescent Drug Use*

Petitioner's delinquent conduct resulted in juvenile detention at age 13. (C. 204) At 15, the juvenile court sent him to live with his 19-year-old brother who introduced petitioner to numerous illicit drugs including marijuana and PCP. (C. 217, 220)

Upon moving back to Chicago, petitioner met Manuel Ramirez and Efren Ramirez with whom he smoked marijuana everyday. The friends snorted cocaine on weekends and used PCP weekly. They often did three to four hits of acid at a time. (C. 225, 228) During this time, he did get violent once when he was on PCP, grabbing his girlfriend around the neck. (C. 225)

At the age of 17, the night before he left for the army, his mother threw a party for him at which she furnished PCP, alcohol, and marijuana. (C. 209, 214) Petitioner's mother's

boyfriend also used PCP heavily. (C. 209) From time to time, his mother made them "pot brownies." (C. 214) From the time that petitioner was discharged from the army until the time of the offense, he continued to be a heavy and habitual drug user. This drug use included PCP, cocaine, marijuana, heroin, and LSD. (C. 208, 214, 225-26, 228-29, 232-33, 253) He used cocaine at least once a week and smoked marijuana every day. (C. 233)

4. *Effects on Petitioner's Neurological and Emotional Development*

A post-conviction psychiatric report on petitioner's mental and emotional well-being was prepared by Dr. Bruce Perry, M.D., Ph.D. Dr. Perry is Chief of Psychiatry at Texas Children's Hospital and a professor in psychiatry and behavioral sciences at Baylor College of Medicine in Houston, Texas. Significantly, he has his M.D. and Ph.D. in neuropharmacology. (C. 284) This meant he offered a scientific expertise not otherwise considered by the trial court.

Based on his findings, Dr. Perry, the neuropharmacologist, concluded that petitioner's judgment was severely impaired at the time of Lisa Ferguson's death. Dr. Perry would have testified that the neglect and abuse during petitioner's formative years influenced the development of his brain. (C. 326) Because his brain was in a state of fear-related and stress-mediated activation, his brain led to increased anxiety and behavioral impulsivity. *Id.*

Dr. Perry's affidavit addressed the specific effects of PCP on the brain and behavior. (C. 326-27) Dr. Perry testified that long-term users of PCP are said to be "crystallized"—a syndrome characterized by dulled thinking, decreased reflexes, loss of memory, loss of impulse control, depression, lethargy, and impaired concentration. *Id.* Short-term PCP intoxication can have potentially severe complications and often are considered a psychiatric emergency. *Id.*

Petitioner's mental disorders, exacerbated by his use of alcohol and PCP preceding the offense, led petitioner to be completely out of touch with reality. *Id.* In essence, he was operating under a condition of extreme mental disturbance. (C. 325-26)

A. Evidence Regarding Events Preceding Arrest

1. *Alcohol and PCP Use*

Petitioner's friends, Manuel, Efren, and Edward Ramirez provided post-conviction affidavits that, on the day of the offense, they had been drinking with petitioner all day. He drank two pitchers of beer and two shots of tequila at Bucko's tavern. (C. 229) Earlier that day, they had been to three or four other bars. (C. 226) They had also smoked marijuana laced with PCP. (C. 226, 229) Defense counsel did not speak with all of these individuals and they were not asked to testify. (C. 226, 230, 233) Josephine Palomino has also given sworn testimony that when petitioner returned to his apartment on the night of the offense at 8:10 p.m., his eyes were glassy, red, and puffy. She testified that he was "pretty gone." (C. 222)

2. *Petitioner's Alleged Statement of "I did it"*

The police have testified that, upon entering petitioner's apartment the day of the offense, they heard him stating, "I did it," allegedly referring to the murder of Lisa Ferguson. However, Josephine Palomino, the only other person in petitioner's apartment when he supposedly admitted to committing the crime, has given sworn testimony in an affidavit that he never stated "I did it" or otherwise admitted to the offense. (C. 222)

B. Evidence Relating to Events at the Police Station

Petitioner alleged that his confession was coerced. Post-conviction affidavits of several witnesses support this claim.

1. *Coercion of Testimony*

Petitioner provided a post-conviction affidavit stating that the investigating officers refused to allow him to rest or use the bathroom until he confessed to the murder of Lisa Ferguson. (C. 281-82) Petitioner was also taken handcuffed to another room where Anthony Ramirez, the original suspect and ex-boyfriend of the victim, was sitting. *Id.* Mr. Ramirez cussed at petitioner and began to attack him. *Id.* Petitioner was told that if he did not cooperate with the police, he would be left alone with Mr. Ramirez. (C. 282) One of the interrogating officers then hit petitioner a few times on the side of his head and threatened him further. *Id.* Petitioner was forced to take off his clothes and was told that if he confessed to the crime, the judge may be more lenient in sentencing. (C. 281-82) Finally, after being told that he would not be able to see his girlfriend, Josephine, until he confessed, petitioner gave his statement as a detective told him exactly how the crime occurred. (C. 282)

2. Evidence of Mental or Emotional Disturbance at Police Station

In their affidavits, Manuel, Efren, and Edward Ramirez have also stated that petitioner was under the influence of alcohol, marijuana, and PCP at the time of his statements at the police station. (C. 226, 229, 233) As stated in an affidavit by neuropsychologist Dr. Bruce Perry, PCP is extremely hallucinogenic and can cause a "psychiatric emergency." (C. 326) After PCP use, a user may lose his memory, lose impulse control, become depressed, and unable to concentrate. *Id.* These short term effects can last up-to six hours. (C. 327) Petitioner was under the influence of PCP at the time he was at the police station. This intoxication can render a waiver of *Miranda* rights ineffective, thus making any confession invalid in a court of law.

D. Evidence Relating to Petitioner's Positive Behavior During Incarceration

Several people who knew petitioner during his incarceration have given sworn testimony regarding his positive behavior during his incarceration, but were not called to testify at the resentencing hearing to rebut the State's aggravation on this subject.

In his affidavit, Charles Margherio, an employee with the Illinois Department of Corrections for ten years, testified to petitioner's positive behavior during his incarceration. (C. 329) Also, Lieutenant Robert Ellinger, an employee of the Illinois Department of Corrections for fifteen years, testified to petitioner's positive behavior during his incarceration. (C. 331) Lt. Ellinger was in charge of the Condemned Unit at Pontiac Correctional Center for two years while petitioner was an inmate. *Id.*

IV. POST-CONVICTION PROCEEDINGS BEFORE THE CIRCUIT COURT

On September 11, 1998, the circuit court dismissed Mr. Smith's petition in its entirety, without holding an evidentiary hearing. The court held, in pertinent part:

> "[W]ell, first of all, claims 1 through 10, I think this is in the nature of. . . alleged ineffective assistance of counsel at the trial. Most respectfully, we feel that those claims are waived for several reasons. Number one, they were or could have been raised on appeal; and number two, if they were not raised—if they were raised and decided, that is *res judicata*. But furthermore, we feel that . . . what is before the court, before me at this point, properly before me on the post-conviction petition is the resentencing hearing and *not* the guilt-innocence phase.
>
> Now claims, 1 through 10, may be and I would have to review it, may be regarding the claims of ineffective assistance of counsel at the resentencing hearing. Clearly, those are properly before the court. However,

> those are points which were or could have been raised to the Supreme Court when the resentencing hearing was appealed and the decision of that was appealed and therefore it is our position that those points are waived.
>
> There are several points which are raised . . . challenging the constitutionality of the death penalty statute. . . . Those were or could have been raised initially back in—after the '89 sentencing, and we do not feel that those are properly brought at this point . . . .
>
> Lastly, I think lastly, the petitioner has raised the ineffective assistance of appellate counsel. We have had an opportunity to review those claims. We considered those claims. We also considered the State's motion to dismiss and which addresses those claims and we find that their motion has merit.

(Report of Proceedings from Hearing on Motion to Dismiss, p. 36-37.) The petitioner filed a Motion for Reconsideration which was heard and dismissed on November 11, 1998.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE QUESTION OF WHETHER A DEATH PENALTY STATUTE LACKING CLEAR OBJECTIVE CRITERIA AND SAFEGUARDS FOR ITS CONSISTENT APPLICATION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

The Illinois Death Penalty Statute provides for its arbitrary and capricious application. It provides that the imposition of a death sentence may be considered only "[w]here requested by the State." 720 Ill. Comp. Stat. Ann. 5/9-1(d) (West 1993 & Supp. 1998) (Appendix G). The statute states:

> "Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the

> existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c)"

Id. § 9-1(d).

A prosecutor may request a sentencing hearing for the purpose of imposing the death penalty only for defendants over the age of eighteen who are accused of first-degree murder. *Id.* § 9-1(b)-(d). In each of the 102 counties in Illinois, the county prosecutor is given total discretion to decide for which death eligible defendants he will request a capital sentencing hearing. *Id.* Where such a hearing is requested, and after a finding of guilt and consideration of statutory aggravating and mitigating factors, a jury or judge may sentence a defendant to death. *Id.* Where a prosecutor does not request such a hearing in a death eligible case, the presiding judge or jury has no authority to impose the penalty of death on a defendant. *Id.* § 9-1(d). As one Illinois Supreme Court Justice aptly noted, this statutory scheme allows each of the 102 prosecutors to "establish his own policy as to when sentencing hearings [that is, the imposition of the death penalty] will be requested." *Carey v. Cousins*, 77 Ill. 2d 531, 557, 397 N.E.2d 809, 822 (1979) (J. Ryan, dissenting).

Because individual prosecutors are under no obligation to conform their approach to seeking death penalty sentencing hearings to any objective standard, whether such a hearing is requested for a particular defendant is dependent upon the philosophy, policy or whim of the prosecutor in the county where a crime is committed. As evidenced by the Illinois Supreme Court's opinion in this case, the court has no intention of overruling its prior rulings on the constitutionality of this structure. *Illinois v. Smith*, 195 Ill. 2d 179, 208-09, 745 N.E.2d 1194, 1211 (2000) (Appendix at D).

While imposing a sentence of death is not *per se* cruel and unusual under the Eighth Amendment or a denial of due

process or equal protection under the Fourteenth Amendment, *Proffitt v. Florida*, 428 U.S. 242, 247 (1976), imposing a sentence of death "arbitrarily or capriciously" violates the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). *See also, Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Harris v. Alabama*, 513 U.S. 504 (1995) (applying Eighth and Fourteenth Amendment analysis to state death penalties).

This Court has recognized that the penalty of death is different in kind from any other punishment imposed under the criminal justice system. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The unique finality and severity of the death penalty requires that the punishment be imposed only under sentencing procedures that safeguard against the risk of infliction in an arbitrary and capricious manner. *Gregg*, 428 U.S. at 189 (holding that statutes must be carefully crafted so as to "minimize the risk of wholly arbitrary and capricious action"). This Court has held that there must be clear factors guiding and justifying the decision to *impose* the death penalty. *See Godfrey*, 446 U.S. at 428; *Gregg*, 428 U.S. at 206 ("Left unguided, juries imposed the death sentence in a way that could only be called freakish").

Despite the strict standards required for the imposition of the death penalty, this Court has never repudiated a statute on the grounds that a prosecutor, in making the decision to *seek* the death penalty, must be guided by similarly strict standards. In fact, this Court has held that a state's statutory provision governing the administration of the death penalty is not rendered unconstitutional under the Eighth or Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital

offenses or in plea bargaining.[4] *See Gregg*, 428 U.S. at 199 (noting that there is no requirement that prosecutors charge a capital offense in every case where there is an eligible defendant). However, the reasoning set forth in this Court's recent decision of *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525 (2000), demonstrates that review on this question is merited.

In *Bush*, this Court granted certiorari on the following question: "Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." 121 S. Ct. at 530. The Court analyzed this question under the Equal Protection Clause. *Id.* at 529-30. It held that although the State legislature's power to select the manner for appointing electors is plenary, having once granted the right, it was obliged to grant it equally. *Id. Bush* further held that the State may not by "arbitrary and disparate treatment, value one person's vote over that of another." *Id.*

Specifically, *Bush* held that because counties in Florida had different standards for manually recounting votes, the process did not have "sufficient guarantees of equal treatment." *Id.* at 530-31. This Court rejected the general standard set forth by the Florida Supreme Court, which commanded the vote counters to consider the "intent of the voter" because it lacked "specific standards to ensure its equal application." *Id.* at

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[4] The constitutionality of the Illinois death penalty statute has been challenged in numerous state and federal court proceedings. *See, e.g., Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989), *rev'd*, 905 F.2d 986 (7th Cir. 1990); *Illinois v. Williams*, 193 Ill. 2d 306, 739 N.E.2d 455 (2000).

In 1989, the prosecutorial discretion provision of the Illinois death penalty statute applicable here, 720 Ill. Comp. Stat. Ann 5/9-1(d), was held unconstitutional by a federal district court in the Central District of Illinois. *Silagy v. Peters*, 713 F Supp. 1246 (C.D. Ill. 1989). *Silagy*, however, was subsequently overturned by the Seventh Circuit, vacating the ruling as to the unconstitutionality of § 9(d). *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990).

530. In order for standards to be sufficient, this Court held that state-wide uniform and consistent rules to determine intent were required. *See id.* at 532.

Similarly, uniform and consistent rules must be required before a statute providing for capital punishment can be deemed constitutional. The lack of clear and consistent standards in Florida impermissibly left the rights of voters subject to the vagueness of statutory interpretation and practices of the county within the state in which they lived. Likewise, the lack of clear and consistent standards in Illinois impermissibly leaves the rights of persons deemed eligible under the bare bones requirements of the death penalty statute subject to the vagueness of statutory interpretation and practices of each county.

The primary flaw regarding the lack of standards in the Florida recount resulted from the creation of two classes of voters, with one class of voters being counted as less significant than the other based on the county the voter was in and the standards his or her county applied. 121 S. Ct. at 531 (noting the disparity created by Broward County's use of a more forgiving standard than Palm Beach County). Similarly, in Illinois, § 9-1(d) of the death penalty statute treats defendants eligible for the death penalty differently on the arbitrary basis of where the defendant committed his or her crime. Each prosecutor in each county has the authority to apply his or her own personal standard, or no standard at all. As Illinois Supreme Court Justice Ryan noted in a dissent:

> There can be no doubt that under this statute some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications will be spared, not as the result of mercy, but because of the uneven application of the law due to the lack of statutory direction to the prosecutor. There will inevitably be cases where there will be no reasonable basis for this distinction between one on

> whom the penalty of death is imposed and another who is passed over. There will be no reasonable explanation for the distinction between the two convicted offenders except that, because of the personal belief or office policy of one State's Attorney, one offender was chosen as a candidate for the penalty of death, whereas for similar reasons personal to another prosecutor, an equally culpable offender was spared.

Cousins, 77 Ill. 2d at 558, 397 N.E.2d at 822 (J. Ryan, dissenting) (citations omitted).

Reliance on county prosecutors to determine whether to seek the death penalty invariably introduces arbitrariness because the 102 counties in Illinois are markedly different in demographics and in the political beliefs of its citizenship. *See* Leigh B. Bienen, *ABA's Proposed Moratorium: The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 Law & Contemp. Probs. 193, 197-98 (1998). Some prosecutors charge every death eligible offense, others select only a subset. *Id.* Some counties have the funds to prosecute many expensive capital cases, others do not. *Id.* All of these differences are relevant in a particular county prosecutor's determination of policy in seeking the death penalty. *Id.* As a result, whether a defendant is sentenced to death is frequently a matter of mere chance depending on the characteristics of the legal jurisdiction where the crime was committed. *Id.*

Finally, neither the discretion granted to Florida counties to determine what constituted the "intent of the voter," nor county prosecutors' decisions as to which defendants will be death eligible are subject to judicial review. In *Bush*, this Court pointed to this additional flaw of the Florida process with concern. 121 S. Ct. at 532 (stating that sufficient safeguards would necessarily include "adequate statewide standards" as well as "orderly judicial review of any disputed matters that might arise"). Likewise, the lack of judicial review of prosecutors' discretionary decisions to seek the

death penalty in some cases, but not in others, is similarly constitutionally deficient.

Petitioner first challenged the constitutionality of the Illinois Death Penalty in the trial court by way of motion. The Illinois Supreme Court noted that in the post-conviction proceeding, the trial court held that the challenge to the Illinois Death Penalty Statute was waived but petitioner argued ineffective assistance of appellate counsel for failure to raise the issue on direct appeal. *Illinois v. Smith*, 195 Ill.2d at 1211, 397 N.E.2d at 677 (Appendix at D). The court summarily concluded that counsel was not ineffective for raising this claim because its earlier decisions had rejected challenges to the statute. *Id.* Nonetheless, the foregoing analysis demonstrates the patent unconstitutionality of the statute and counsel's failure to pursue the issue was deficient and caused petitioner prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court should grant review of this issue to determine the constitutionality of the statute and counsel's action in not pursuing the issue.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO ESTABLISH CLEAR STANDARDS FOR THE PROCESS DUE UNDER POST-CONVICTION PROCEEDINGS IN WHICH CONSTITUTIONAL CLAIMS HAVE BEEN RAISED

The Illinois Post-Conviction Hearing Act ("Act") provides an opportunity for review of guilt-innocence claims as well as sentencing claims. As the Illinois Supreme Court stated, "The [Illinois] Post-Conviction Hearing Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trial or sentencing hearing." *Illinois v. Smith*, 195 Ill. 2d at 186, 397 N.E.2d at 1199 (Appendix at D). In order to invoke the Act, a petition for post-conviction relief must be filed in the circuit court in which the

original proceeding took place. *See* 725 Ill. Comp. Stat. Ann. 5/122-1 (Appendix at G).

The petitioner complied with the requirements of the Act and filed a *pro se* post-conviction petition on December 21, 1995, which was amended on December 6, 1997. *Illinois v. Smith*, 195 Ill. 2d at 186, 397 N.E.2d at 1199 (Appendix at D). However, the trial court erroneously concluded that the guilt-innocence claims raised in petitioner's post-conviction petition were either waived or barred by the doctrine of *res judicata*. The trial court therefore did not even consider whether petitioner established grounds for an evidentiary hearing before dismissing the post-conviction petition. On appeal to the Illinois Supreme Court, the petitioner argued and the State conceded at oral arguments, that petitioner's post-conviction claims were timely presented to the trial court. *Illinois v. Smith*, 195 Ill. 2d at 187, 397 N.E.2d at 1200 (Appendix at D). Rather than remand the case for initial consideration by the trial court, the Illinois Supreme Court, relying on its opinion in *Illinois v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998), proceeded to apply what it termed "*de novo*" review of the petition. *Illinois v. Smith*, 195 Ill. 2d at 187, 397 N.E.2d at 1199 (Appendix at D).

The Illinois Supreme Court's approach in addressing the petition was flawed by applying what it deemed *de novo* review without remanding to the trial court for consideration of whether a hearing was required. In doing so, the Illinois Supreme Court deprived petitioner of part of the process he was due—specifically, the trial court's full consideration of the post-conviction petition and the parties' arguments in the first instance. *See, e.g., Illinois v. Kitchen*, 189 Ill. 2d 424, 434-35, 727 N.E.2d 189, 194 (2000) (holding the "circuit court violated the defendant's right to procedural due process" by denying the defendant's post-conviction petition "without notice to the parties and without the benefit of argument from either defendant or the State.")

The Illinois Supreme Court erred in applying "*de novo*" review because as its opinion in *Coleman* makes clear, the *de novo* standard of review is applicable only when the trial court has dismissed the post-conviction petition *after* considering all well-pled facts as true in favor of the petitioner and *after* determining that an evidentiary hearing is unnecessary. *See Coleman*, 183 Ill. 2d at 378, 701 N.E.2d at 1070 ("In ordering the dismissal, the [trial] court specifically ruled that 'there's nothing remarkable about the Defendant's argument in support of the petition for post-conviction relief. This Court finds the allegations do not rise to a significant deprivation of rights under the constitutions of the United States and the State of Illinois.'"). The trial court in this case however has not yet considered petitioner's post-conviction petition as is required by the Act.

By enacting the Act, Illinois has chosen to provide a comprehensive framework for review of post-conviction claims, which must begin with the trial court in which the original proceeding took place. *See* 725 Ill. Comp. Stat. App. 5/122-1. As the Illinois Supreme Court even noted in *Coleman*—the very case it relied upon to circumvent the procedural due process safeguards mandated by the Illinois General Assembly—"[it] has construed the Act to require 'that when a petition is filed invoking the act, the trial court *shall* examine the petition with a view to determining whether the allegations of fact, liberally construed in favor of the petitioner, and taken as true, make a showing of imprisonment in violation of the Federal or State constitution . . . ." 183 Ill. 2d at 380, 701 N.E.2d at 1071 (emphasis added).

Petitioner is entitled to the benefit of every step of the delineated process. The Illinois courts cannot allow any step in the process established by the legislature to be skipped. *See cf. Service v. Dulles*, 354 U.S. 363, 388 (1957) (requiring petitioner be given full process available before federal

employment decision final'"). That is because, as this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (Title VII), "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." In failing to remand the matter for further proceedings consistent with the Act, the Illinois Supreme Court deprived petitioner of the process he was due. *See, e.g., Kitchen*, 189 Ill. 2d at 434-35, 727 N.E.2d at 194.

In *Kitchen*, the trial court denied the petitioner's post-conviction petition without notice to the parties and "without the benefit of argument from either defendant or the State." *Id.* at 435, 727 N.E.2d at 194. On appeal, which was decided after the *Coleman* opinion was rendered, the Illinois Supreme Court held, "We, therefore, vacate the circuit court's order denying post-conviction relief and remand the cause for further proceedings consistent with this opinion and the Act." *Id.*

The court in *Kitchen* further stated:

> This court, long ago, acknowledged that the Act should not be so strictly construed that a fair hearing be denied and the purpose of the Act, *i.e.*, the vindication of constitutional rights, be defeated. . . . In vacating the circuit court's judgment, we today, as in *Bounds*, mean to send a clear message to both bench and bar that the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance. We trust that such a violation will not soon be repeated in our courtrooms.

Id. at 194-95, 727 N.E.2d at 895-96 (emphasis in original).

Accordingly, the Illinois Supreme Court's failure to remand the petition was fundamentally unfair and a violation of due process because the post-conviction trial judge never fully considered the petitioner's post-conviction petition before denying it. Nor did the trial judge ever determine that

an evidentiary hearing was unnecessary. Had the post-conviction trial court—which presided over the trial, imposed the sentence and, as a trial court, was more attuned to evidentiary nuance—believed it had jurisdiction to make such a determination, it may well have ordered an evidentiary hearing on some or all of the claims of the petition. If the post-conviction trial court had ruled in favor of petitioner, the Illinois Supreme Court likely would have deferred to its findings and determinations. Since that step has been skipped, the petitioner lost an opportunity in this case, unlike all other cases, for the trial court to make the initial determination. This Court should grant review to clarify the standard of the process due a defendant seeking post-conviction relief under a statutory scheme providing for two-level review of claims.

III. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE SUPREME COURT OF ILLINOIS ERRONEOUSLY APPLIED THE *STRICKLAND* STANDARD IN CONCLUDING PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE

Petitioner presented strong evidence in his post-conviction petition that trial counsel rendered ineffective assistance of counsel by failing to suppress key evidence at the guilt-innocence phase. Specifically, two statements of petitioner—arguably the most damaging evidence that can be offered in a criminal case—were admitted erroneously. Had counsel pursued and properly used available evidence, these statements would not have been admitted and the result at trial would have been different.

A. Statement at Police Station

One of the key pieces of evidence was a signed confession given at the police station on the night of the crime.

Petitioner alleged that his confession was coerced and provided support for this claim in his post-conviction petition with affidavits of several witnesses. As set forth in detail above, the testimony of Rose Palomino—which included corroboration of claims of physical abuse—was powerful evidence to support coercion. Rose Palomino's testimony should have been raised on direct appeal and counsel's failure to do so rendered assistance of counsel ineffective.

More importantly, there was significant evidence that petitioner could not have made a voluntary statement and knowingly and intelligently waived his Miranda rights because of his extensive drug and alcohol use earlier that same day. The post-conviction petition included affidavits of three witnesses that would have testified that they were with petitioner the day of the crime and that petitioner was under the influence of excessive amounts of alcohol, marijuana, and PCP at the time of the statement at the police station.

Moreover, trial counsel failed to engage and call a medical expert to testify about the effects of PCP use and petitioner's long-term drug use on the question of whether petitioner's confession was coerced and whether the waiver of *Miranda* rights was knowing. PCP is extremely hallucinogenic and can cause a psychiatric emergency. This intoxication can render a waiver of *Miranda* rights ineffective. It is impossible that anyone with petitioner's state of mind could have knowingly waived his Fifth Amendment rights.

B. Statement at Petitioner's Home

A second key piece of evidence that trial counsel failed to suppress at the guilt-innocence phase was an alleged statement of "I did it" made by the petitioner that was overheard by the police outside of petitioner's home. Even though defense counsel filed a motion to suppress the alleged statement, counsel failed to call Josephine Palomino, a key witness who was present at the time the alleged statement was

made. Her affidavit completely refutes that this statement was ever made or that petitioner otherwise admitted to any offense.

The introduction and use of both of these statements was unquestionably damaging to petitioner. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" *Citing Bruton v. United States*, 391 U.S. 123,139-140 (1968) (White J., dissenting)). The other evidence presented at trial was primarily circumstantial, as the physical evidence was not scientifically corroborated. Thus, counsel's failure to respond to the state's use of these statements appropriately rendered counsel's performance ineffective. Accordingly, the Illinois Supreme Court erred in refusing to acknowledge a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). This court should grant review to clarify this standard in the context of counsel's performance in addressing such evidence.

IV. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE SUPREME COURT OF ILLINOIS ERRONEOUSLY APPLIED THE *STRICKLAND* STANDARD IN CONCLUDING THAT THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE RESENTENCING PHASE

At petitioner's resentencing hearing, counsel failed to call or adequately investigate the availability or need for key expert and percipient witnesses. Had the mitigation evidence that was presented in petitioner's post-conviction petition been presented at the resentencing hearing, it would have established that petitioner was acting under an extreme

emotional and mental disturbance, that petitioner's abusive background and family history was extremely mitigating, and that petitioner generally conducted himself in a lawful, non-aggressive manner while in prison.

A. Failure to Demonstrate Petitioner's Extreme Emotional and Mental Disturbance Through Competent Evidence Regarding Drug Abuse

As set forth above, the affidavits presented in support of the post-conviction petition established that petitioner had a substantial—indeed, extraordinary—history of drug and alcohol abuse. While counsel had some appreciation of this, unfortunately he did not take the minimally required steps to develop and present the evidence in a way that would allow it to serve as meaningful mitigation. At the resentencing, counsel failed to present the complete picture and extent of abuse that is set forth in the post-conviction affidavits. More importantly, counsel failed to present appropriate expert testimony to explain the physical and psychological effects of this abuse as mitigation.

The sentencing court considered evidence from Dr. Savarese, a licensed clinical social worker, and Dr. Heinrich, a clinical psychologist. While this evidence provided some insight into the effects of drug abuse from the perspective of a social worker and psychologist, the sentencer was not provided with the technical, medical and scientific analysis that could have been provided only through a qualified medical doctor. Such an expert was available in Dr. Bruce Perry. Unlike Savarese, the social worker, or Heinrich, the psychologist, Dr. Perry has the medical and scientific training and experience that allows him to speak authoritatively on the long and short term effects of hallucinogenic drugs and other narcotics. Significantly, the state attacked the credentials of Savarese to opine on the effects of drug abuse and defense counsel did not effectively rebut this by calling an expert such as Dr. Perry.

The analysis set forth in Dr. Perry's affidavit is much farther reaching than anything to which the non-medical experts could testify. His testimony included: discussion of the correlation between PCP and agitated and violent behavior; the severity of behavioral disturbances brought about by PCP use—including the user becoming irrational, assaultive, and homicidal; the occasion of "psychiatric emergency" as a result of PCP use; and hallucinatory and fantasy thoughts. (C. 284-326).

The clear ineffectiveness of counsel's efforts on this issue is even clearer when considering that the testimony of the psychologist Heinrich suggested that petitioner demonstrated indications of neurological problems requiring further testing and analysis. Such testing and analysis could only have been provided by a competent medical expert such as Dr. Perry.

The murder here was particularly brutal. Yet, petitioner lacked any history of violent crime or sexual crime. It was readily apparent that something did not add up and it was incumbent upon counsel to investigate further and seek the assistance of a competent expert. Illinois law recognizes that scientific and medical testimony may be offered to explain the effects of drug abuse, including the use of PCP, is proper. *See Illinois v. Wright*, 111 Ill.2d 18, 488 N.E.2d 973 (1986) (doctor specializing in effects of drug addiction found persuasive in post-conviction proceeding); *Illinois v. Free*, 94 Ill.2d 378, 447 N.E.2d 218 (1983) ("that expert testimony concerning the drug PCP was necessary cannot be contested").

Moreover, defense counsel did not present evidence from the occurrence witnesses who would have testified about petitioner's PCP use. The evidence concerning the historical and contemporaneous drug use is detailed and strong. Some—but not all—of these witnesses were available and interviewed by counsel prior to sentencing. However, failure to call them cannot be attributable to trial strategy where the

evidence they could have provided was such a critical part of demonstrating petitioner's extreme emotional and mental disturbance. *Illinois v. Perez*, 148 Ill.2d 168, 592 N.E.2d. 984 (1992) (recognizing that failure to investigate cannot be a trial strategy and failure to present mitigation in counsel's possession constitutes ineffectiveness).

B. Failure to Present a Complete Picture of Family History and Background

As set forth above, the affidavits presented in support of the post-conviction petition established that petitioner had a particularly tumultuous and abusive upbringing. Under Illinois law, "evidence of a defendant's background, includeing family history, parental abuse, and neglect is important to the sentencing decision and can be an influential mitigating factor." *Illinois v. Morgan*, 187 Ill. 2d 500, 719 N.E.2d 681 (1999). Counsel bore the responsibility of portraying petitioner's background as fully as possible.

While some evidence of petitioner's tumultuous and abusive background was offered at sentencing, the complete picture was not presented. The degree of physical and emotional abuse, the encouragement of serious drug use by his mother, the full length and extent of his drug use, and the unusual sexual history were not fully portrayed until the post-conviction petition. (C. 199-233)

This court has recognized that the Sixth Amendment guarantees a defendant the right to have all mitigating evidence presented on his behalf. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Whether through a failure to discover the evidence or a failure to offer the evidence, counsel is ineffective where all available mitigation is not offered. It is inconceivable that evidence of this nature could not be pursued or presented based upon a "tactical decision."

Trial counsel's failure to present the available substantial mitigating evidence at petitioner's resentencing hearing

demonstrates his ineffectiveness. Therefore, the Illinois Supreme Court erroneously applied the *Strickland* standard in concluding petitioner received effective assistance of counsel at the resentencing phase.

C. Failure to Rebut Aggravating Evidence of Petitioner's Conduct While in Prison

At the re-sentencing, the state attempted to portray petitioner as aggressive and incapable of conforming himself to the rules and requirements of incarceration. While this hardly seems the kind of evidence that would be determinative in a capital sentencing, it was offered and considered and thus should have been rebutted. As set forth above, ample evidence existed to rebut the state's aggravation. Correctional officers who were familiar with petitioner and his conduct while residing in the condemned unit would have testified to petitioner's generally peaceable and law-abiding conduct and nature there. (C. 329-31)

Counsel's failure to address this comparatively simple issue and put forth basic contrary testimony demonstrates an overall lack of competence and effectiveness. There is no question that petitioner was entitled to a complete mitigation picture and counsel did not provide that.

This Court should grant review to clarify the limitations of counsel's responsibility to present mitigating evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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